

# Exhibit 5

UNITED STATES DISTRICT COURT  
EASTERN DISTRICT OF NEW YORK

In Re: Exactech  
Polyethylene Orthopedic  
Products Liability  
Litigation

22-MD-03044(NGG)

United States Courthouse  
Brooklyn, New York

May 19, 2023  
11:00 a.m.

TRANSCRIPT OF CIVIL CAUSE FOR STATUS CONFERENCE  
BEFORE THE HONORABLE NICHOLAS G. GARAUFI  
UNITED STATES DISTRICT JUDGE

A P P E A R A N C E S:

For the Plaintiffs:

POPE MCGLAMRY, P.C.  
3391 Peachtree Road, NE, Suite 300  
Atlanta, Georgia 30326

BY: N. KIRKLAND POPE, ESQ.

WEITZ & LUXENBERG, P.C.  
700 Broadway  
New York, New York 10003

BY: ELLEN RELKIN, ESQ.

ROBINS, KAPLAN LLP  
1325 Avenue of the Americas  
Suite 2601  
New York, New York 10019

BY: RAYNA KESSLER, ESQ.

BURG SIMPSON  
201 E Fifth Street, Suite 1340  
Cincinnati, Ohio 45202

BY: DAVID C. HARMAN, ESQ.

*Proceedings*

2

A P P E A R A N C E S: (Continued.)

For the Plaintiffs: LIEFF CABRASER  
HEIMANN & BERNSTEIN, LLP  
One Nashville Place  
150 Fourth Avenue, North, Suite 1650  
Nashville, TN 37219

BY: MARK P. CHALOS, ESQ.

For the Defendant: KIRKLAND & ELLIS  
601 Lexington Avenue  
New York, NY 10022

BY: JAY P. LEFKOWITZ, ESQ.  
CHRISTA C. COTTRELL, ESQ.

FAEGRE DRINKER BIDDLE & REATH LLP  
25 Oak Ridge Avenue  
Summit, NJ 07901

BY: SUSAN M. SHARKO, ESQ.

Court Reporter: DENISE PARISI, RPR, CRR  
Official Court Reporter  
Telephone: (718) 613-2605  
E-mail: DeniseParisi72@gmail.com

Proceedings recorded by computerized stenography. Transcript  
produced by Computer-aided Transcription.

\* \* \* \* \*

(In open court.)

THE COURTROOM DEPUTY: This is an MDL matter.

Beginning with the plaintiffs, please state your  
appearances for the record.

MS. RELKIN: Good morning, Your Honor.

Ellen Relkin from Weitz & Luxenberg for the  
plaintiffs.

*Proceedings*

3

1 THE COURT: Good morning. Nice to see you again.

2 MR. POPE: Good morning, Your Honor.

3 Kirk Pope for plaintiffs.

4 THE COURT: Good morning.

5 MS. KESSLER: Good morning, Your Honor.

6 Rayna Kessler on behalf of plaintiffs MDL liaison  
7 counsel.

8 THE COURT: Good morning.

9 MR. HARMAN: Good morning, Your Honor.

10 David Harman with Burg Simpson on behalf of  
11 plaintiffs.

12 THE COURT: Good morning.

13 Is that it for the plaintiffs?

14 MR. CHALOS: Mark Chalos, Your Honor, for plaintiffs  
15 as well.

16 THE COURT: All right. Good morning, sir.

17 For the defendants, TPG, et cetera?

18 I think you are on mute, Mr. Lefkowitz. There you  
19 go.

20 MR. LEFKOWITZ: My apologies.

21 Jay Lefkowitz on behalf of the TPG defendants.

22 THE COURT: Good morning.

23 MS. COTTRELL: Good morning, Your Honor.

24 Christa Cottrell also on behalf of the TPG  
25 defendants.

*Proceedings*

4

1 THE COURT: Good morning.

2 MS. COTTRELL: Good morning.

3 MS. SHARKO: And Susan Sharko for the Exactech  
4 defendants.

5 THE COURT: Good morning.

6 All right, is that everyone? Okay.

7 I just had a question for Mr. Lefkowitz as we start.

8 In your letter requesting this pre-motion  
9 conference, you indicate that you're located in New York City  
10 and that there are other lawyers who are at 300 North LaSalle,  
11 but it doesn't say where 300 North LaSalle is.

12 MR. LEFKOWITZ: Sure. Thank you, Your Honor. It's  
13 our Chicago office. We have offices in New York and in  
14 Chicago.

15 THE COURT: I see.

16 MR. LEFKOWITZ: My partner, Ms. Cottrell is, I  
17 think, dialing in from Chicago, and I'm here in Manhattan.

18 THE COURT: Yes, she's on the video. I was just  
19 curious because if -- for no other reason that I actually read  
20 these letters.

21 MR. LEFKOWITZ: Thank you, Your Honor.

22 THE COURT: All right.

23 Well, then, let's move ahead.

24 This is a request to make a motion to dismiss  
25 certain defendants from the case, so let me hear from you,

*Proceedings*

5

1 Mr. Lefkowitz about this, why we should do this even though  
2 we're in the middle -- or beginning of discovery, and whether  
3 discovery is really needed before this motion should be heard.

4 MR. LEFKOWITZ: Sure. Thank you, Your Honor. And I  
5 will be very brief here.

6 The Delaware court, the Chancery Court, in a  
7 decision last year by Chancellor McCormick made very clear --  
8 and the case is *Verdantus Advisors vs. Parker*  
9 *Infrastructure* -- and I will just give the cite -- I think  
10 we're on the record, so I will give you the cite -- 2020  
11 WestLaw 5951368. That was a case where the chancellor made  
12 very clear that there is an enormously high bar to pleading  
13 successfully the factors necessary for veil piercing. And, in  
14 fact, the courts have a five-factor test, and it's not  
15 sufficient to just plead one, or even two of the factors. In  
16 that case, in fact, there was an allegation that the company  
17 was, in fact, inadequately capitalized. There was an  
18 allegation that there were funds that were siphoned out of the  
19 company and that the company observed few, if any, of the  
20 corporate formalities. Those are three of the factors. And  
21 even in that case, where all three of those factors were, in  
22 fact, pled, the Court said it's not sufficient because I don't  
23 see allegations that the company is functioning simply as a  
24 facade for the dominant shareholder; that this is essentially  
25 a vehicle for fraud.

1           And in our case, Your Honor, we don't even have  
2     allegations that -- in any of those five factors. What we do  
3     have are allegations of TPG having control over Exactech, or  
4     over an agreement, but of course, as the Delaware Chancery  
5     Court said in *Skouras vs. Admiralty*, which is at 386 A.2d 674  
6     at page 681, quote: Even total ownership of one corporation  
7     by another is not sufficient to warrant the disregard of a  
8     separate corporate entity.

9           And, likewise, we have allegations that there's  
10    direct involvement in the operation and management of Exactech  
11    and that's in the complaint, to be sure, but just recently --  
12    well, actually, not quite so recently, but in the Eastern  
13    District in *Ross Products Division vs. Saper* at 2007 WestLaw  
14    1288125, dismissed a veil piercing claim even though the  
15    plaintiff's allegation was that the defendant was directly  
16    involved in the operation and management of the -- another  
17    corporate entity.

18          And, finally, we also have allegations in the  
19    complaint that the officers are identical, the directors are  
20    identical. Actually, they don't allege that all of them, just  
21    that there's overlapping. But, in fact, the cases made  
22    clear -- and this is a Delaware Chancery decision from 2020,  
23    *Nieves vs. Insight Building*, 2020 WestLaw 4463425, that even  
24    if all of the officers and directors were identical, that  
25    would not be enough to state a claim.

1           The fact is, Your Honor, that the kinds of  
2       allegations that you need to get past a motion to dismiss --  
3       and I will give just one example where the Delaware Chancery  
4       Court did deny a motion to dismiss -- that is *Manichaeen Cap*  
5       *vs. Exela Techs Incorporated* --

6           THE COURT: Can you spell that for the court  
7       reporter?

8           MR. LEFKOWITZ: Yes. M-A-N-I-C-H-A-E-A-N,  
9       *Manichaeen Cap vs. Exela*, E-X-E-L-A, *Techs*, T-E-C-H-S,  
10      Incorporated, and that's at 251 A.3d 694, and the relevant  
11      page in that case is 708. That's a case where the Delaware  
12      Chancery Court did, in fact, deny a motion to dismiss, because  
13      it found that the plaintiff had pled a combination of  
14      insolvency intentional under capitalization and a lack of  
15      corporate formalities coupled with valid claims of fraud and  
16      injustice.

17           We just don't have any of those types of allegations  
18      here. What we have is allegations that Exactech, which is a  
19      fully functioning company that was purchased with \$700 million  
20      of infused capital, is simply a subsidiary, or an affiliate of  
21      a larger private equity firm, and that has simply not been and  
22      never been sufficient for veil piercing.

23           So we would like the opportunity, Your Honor, to  
24      file an appropriate motion. We think the motion obviously has  
25      good grounds and is well-founded, and we would like the



*Proceedings*

8

1 opportunity to file the motion.

2 Now, if I may, I can go into your second part of the  
3 question, because it relates to this issue of, is it premature  
4 or not, or should we have discovery, and I'm happy to just  
5 flow into that and just take a minute or two.

6 THE COURT: Take a minute or two and then I will  
7 turn to the plaintiff.

8 MR. LEFKOWITZ: Sure.

9 The courts both in the Eastern and the Southern  
10 District of New York looking at these issues have made clear  
11 that it's perfectly appropriate to consider a motion to  
12 dismiss veil piercing just based on the pleadings itself.

13 Now, often what happens is the defendant is moving  
14 both to dismiss on corporate veil, but also to dismiss on lack  
15 of personal jurisdiction. And in that situation, when courts  
16 take those motions together, they often say, well, maybe we  
17 should have some jurisdictional discovery because we always  
18 put a thumb on the scale in favor of jurisdictional discovery  
19 if there's a good faith basis to tee that up. Just to be  
20 clear, we are not seeking to get out of the case on  
21 jurisdictional grounds; we're not saying we're not subject to  
22 the jurisdiction here.

23 And, in fact, earlier this week, literally just a  
24 couple days ago, Magistrate Judge Aaron, in the Southern  
25 District of New York, denied a veil piercing request for veil

*Proceedings*

9

1 piercing discovery precisely because the plaintiff did not --  
2 and I quote -- "have a viable well piercing theory that was  
3 pled." That's Wilson & Wilson 2023 WestLaw 3449163.

4 And I just want to make one final point.

5 We hear it a lot in the opposition letter to a case  
6 called *Blockchain*, and that was a case where what was argued  
7 was, well, the Court allowed discovery to proceed based on  
8 alter ego. But if you read the case carefully, what you  
9 realize is, alter ego is being used there in two different  
10 context: One, for purposes of the personal jurisdiction  
11 motion to dismiss, and, in fact, the judge did in that case  
12 allow some jurisdictional discovery to take place. But at the  
13 same time, critically, even in that case, the *Blockchain* case,  
14 which plaintiffs rely on, where the Court allowed limited  
15 pre-motion to dismiss discovery, it was limited to the  
16 jurisdictional issues and it excluded the discovery tailored  
17 only to the veil piercing claim, which is what we have here.  
18 You can't quite find it just by reading the opinion, but if  
19 you actually look at the docket, which I did, and you pull up  
20 the document requests and then you compare what the judge did  
21 in that case in terms of which discovery he allowed and which  
22 discovery he disallowed, it's absolutely clear that he denied  
23 request for information about shared services, about transfer  
24 of assets, about finance of the subsidiary, selection of the  
25 subsidiaries' executives, and involvement of the parent in the

1 subsidiary operations generally.

2 So I would submit, Your Honor, that even the  
3 *Blockchain* case, which the plaintiffs are relying on here,  
4 actually supports our request entirely.

5 And so, Your Honor, the last thing I would just say  
6 from the equities perspective is, Exactech has received  
7 discovery requests, and of course discovery is proceeding  
8 against Exactech, they're not going to be asking for a stay of  
9 discovery pending our motion to dismiss, and I have matched up  
10 several of the RFPs that are being submitted to us, and they  
11 are entirely duplicative -- at least six of the RFPs to us --  
12 things like all the due diligence documents related to the  
13 merger, all the documents related to the purchase price, all  
14 the minutes between Exactech and TPG entities, all the  
15 partnership agreements of all the TPG entities. Those are all  
16 part of the Exactech discovery that Exactech is going to be  
17 producing in this case.

18 So I would submit, Your Honor, that given that they  
19 have not pled any of the five specific elements necessary for  
20 veil piercing, that both -- that we be permitted to file a  
21 motion to dismiss, which we are happy to do expeditiously, and  
22 that discovery against TPG be stayed until that motion is  
23 decided.

24 THE COURT: All right.

25 Thank you.

*Proceedings*

11

1 Ms. Relkin or Mr. Pope? Who would like to speak?

2 MR. CHALOS: Me, Your Honor. Mark Chalos, if that's  
3 okay.

4 THE COURT: Mr. Chalos, sorry about that.

5 MR. CHALOS: Certainly.

6 So I guess it's a good thing we are not in the  
7 Delaware Chancery Court here. The cases that Mr. Lefkowitz  
8 mentioned I don't think really have much relevance here, at  
9 least with respect to the pleading itself. We are under  
10 Rule 8; a short and plain statement of the claim showing the  
11 pleader's entitled to relief is what we need to do at this  
12 point, but let me back up and try to address the bigger  
13 picture issue.

14 Does it make sense to do this motion now? And we've  
15 had some discussions with the defendant, and -- defendants,  
16 and they say this is a Rule 12(b)(6) motion, it is going to  
17 solely test the sufficiency of our allegations here, and if  
18 that's true, then that's one set of -- that's one set of  
19 circumstances.

20 But these issues -- these alter egos issues, and we  
21 also have a successor liability claim here -- they are  
22 inevitably very fact-intensive, and where we find ourselves at  
23 this point is we are limited in what we have access to. We  
24 have access to public records, because at one time there were  
25 a couple entities that were publicly traded here, so we have

*Proceedings*

12

1 some of their publicly filed documents, but really the core of  
2 what we need to establish our claim at trial is information  
3 they have but are refusing to give to us.

4 So what we're left with is seeing the smoke here  
5 without having access to the fire.

6 Judge, your camera went off.

7 Does that mean he's gone?

8 THE COURT: He's here.

9 MR. CHALOS: Okay. I just wanted to make sure you  
10 didn't get disconnected.

11 THE COURT: No. I heard every word. Go ahead.

12 MR. CHALOS: So to the extent their motion is, well,  
13 they didn't plead this element, they didn't plead that  
14 element, you know, that's one set of circumstances -- what  
15 they're going to say is, well, you don't have enough facts  
16 here; you haven't pleaded a fulsome set of facts that will get  
17 you to a jury necessarily -- then we think that would be an  
18 unfair motion at this point. That's a motion that should be  
19 made after we've gotten the discovery that we're going to need  
20 to prove our claims.

21 We, in our view, have met the Rule 8 standard.  
22 We've pleaded adequately causes of action against these  
23 various alterego and successor liability defendants, and if  
24 that's the motion they're going to file, then so be it. If  
25 the motion they're going to file is fact-intensive, we may be

*Proceedings*

13

1 right back here.

2 Now, let me say a word about discovery.

3 We've asked for discovery, we've asked for  
4 documents, and they've refused to give us the documents. They  
5 just filed, I think yesterday afternoon, a motion to stay  
6 discovery, I'm sure in anticipation of the discussion today.

7 We have -- it is true we've asked for this  
8 information from Exactech as well. Exactech filed an answer  
9 to our master complaint and it's docket, I think 204, and with  
10 respect to a lot of these core issues -- Exactech doesn't deny  
11 the substance of most of our allegations regarding TPG and the  
12 interrelationship and the control and the flow of power and  
13 money through the organizations, but they do say they don't  
14 have information about a lot of the core issues that go to  
15 both the veil piercing and the successor liability, and they  
16 respond in a pleading where they list our allegations and they  
17 list their answers, so Your Honor can see that they say they  
18 don't have the information.

19 So I'm not expecting that we're going to get a lot  
20 of the core information from Exactech. I think much of this,  
21 if not all of it, is in the possession of the TPG entities in  
22 terms of the flow of money, the flow of control, the  
23 overlapping in the relationship of the entities. So to the  
24 extent that we can get some of this information from Exactech,  
25 that might be true, but I think for most of it, that's

1 probably not going to prove to be the case.

2           So to sum it up, Your Honor, if what they're filing  
3 is a true 12(b)(6) motion -- we're not considering materials  
4 outside the pleadings; they're not attaching declarations;  
5 they're not contesting our facts; they're not saying, well,  
6 you need to consider these other facts, Judge; and if you look  
7 at all these other facts outside of the pleadings, then you  
8 will see that their pleadings are insufficient -- if it's not  
9 that motion, if it's just a straight 12(b)(6) on the  
10 allegations, then I think we can deal with that.

11           Let me make one last point about the Delaware law.  
12 That touches on a bigger issue, which is they are presenting  
13 this as a clean shot where they can come to Your Honor and  
14 make a motion and then all the TPG entities, again, that are  
15 out of this, I think it's going to be a little more  
16 complicated than that.

17           Among other things the question of choice of law is  
18 going to be complicated. I think it's in this Circuit based  
19 on the GM ignition switch case and some cases cited within  
20 that, including the *Anschutz Corp. vs. Merrill Lynch* case from  
21 2012, Your Honor may have to engage in a fairly complex  
22 choice of law analysis here because we do have plaintiffs who  
23 have filed and transfer reports all around the country. So it  
24 may not be that Delaware laws, they I guess seem to think,  
25 would apply necessarily to all of the claims. So it may be a

*Proceedings*

15

1 little more complicated than, here's our motion, here's what  
2 the Delaware Chancery Court says, we're out of here and we're  
3 done. I don't think it will be that simple. So that may be a  
4 battle for another day, but I wanted to point that out to Your  
5 Honor.

6 THE COURT: All right.

7 MR. LEFKOWITZ: Your Honor, may I have just about a  
8 minute?

9 THE COURT: Yes, sure, a minute.

10 MR. LEFKOWITZ: Sure. Perfect.

11 First of all, on the Delaware point, I just want to  
12 make clear that Florida and Delaware law are going to apply --  
13 most states, frankly, other than about eight states in the  
14 country -- apply the Delaware standard, which would be  
15 appropriate since Delaware and Florida are the same standard  
16 as well. The other eight states in the country simply apply  
17 blackletter hornbook law on veil piercing. I don't think  
18 there's going to be an issue there.

19 Number two, they say they don't have access to  
20 records. I actually think they've gotten quite a bit already  
21 in the Florida litigation because they pled in this complaint  
22 that there were seven different drafts of the merger  
23 agreement. That's certainly not publicly available.

24 But the most important thing I just want to close  
25 with, Your Honor, is the Southern District of New York in a



*Proceedings*

16

1 case called *Sabot vs. Bayer Healthcare* -- this is at 439 F.  
2 Supp 3d, 131 at page 146 -- granted a motion to dismiss with  
3 respect to veil piercing because it said that, quote: An  
4 allegation relying on a veil piercing theory is -- sorry, the  
5 plaintiffs have said just what we've heard here, that an  
6 allegation relying on veil piercing unsuited for resolution on  
7 a pre-answer pre-discovery motion to dismiss, and the Southern  
8 District court granted the motion and said: Why? Because the  
9 defendant -- the allegations about the defendant's parent  
10 company were simply conclusory allegations. That is exactly  
11 what we have here.

12 Even listening to counsel right now, he doesn't make  
13 allegations that hit any of the five factors at all. Simply  
14 stated, there's no coherent theory of veil piercing here.  
15 It's purely conclusory, and since we don't have well-pled  
16 facts, at the very least, Your Honor, we would like the  
17 opportunity, prior to the initiation of any discovery against  
18 TPG, recognizing that a lot of the documents they're asking  
19 for from TPG are actually going to come directly from  
20 Exactech, but we'd like the opportunity briefly to brief and  
21 then argue, or if the Court wants, to have it submitted on  
22 paper.

23 THE COURT: How much time would you need to make  
24 this motion of yours?

25 MR. LEFKOWITZ: Christa, I believe you've worked out

*Proceedings*

17

1 a schedule with the plaintiff, correct?

2 MS. COTTRELL: Yes.

3 Good morning, Your Honor. Christa Cottrell. I  
4 believe we agreed on wit plaintiffs 21 days for opening  
5 brief --

6 THE COURT: Hold on. I need dates, so just hold one  
7 minute. That's the 9th of June.

8 MS. COTTRELL: I have the 9th of June, too.

9 THE COURT: Next.

10 MS. COTTRELL: And then this one is going to be  
11 tricky for us to calculate, but 35 days is what we talked  
12 about plaintiffs for their response.

13 THE COURT: 9th of June to the -- let's make it the  
14 14th of July. Let's round it off.

15 MS. COTTRELL: Okay. That sounds good here.

16 And we talked about 14 days for our reply.

17 THE COURT: That's the 28th of July.

18 MS. COTTRELL: Yes.

19 THE COURT: And if we need oral argument, we'll  
20 advise you.

21 MR. LEFKOWITZ: Thank you, Your Honor.

22 THE COURT: All right. I'm going to refer your  
23 request for the stay to Judge Henry so you can argue that  
24 before her because I -- we've -- I think it's best since she's  
25 overseeing discovery for the Court that you make that

1 application to her.

2 Anything further for today?

3 MR. LEFKOWITZ: None from us, Your Honor.

4 THE COURT: Anything else, Mr. Chalos?

5 MR. CHALOS: No, Your Honor, not unless Mr. Pope or  
6 Ms. Relkin have anything else.

7 THE COURT: Yes, anything else from you, Ms. Relkin?

8 MS. RELKIN: No, Your Honor.

9 THE COURT: Mr. Pope?

10 MR. POPE: No, Your Honor.

11 THE COURT: It was good to see you all down in  
12 Gainesville. This was my first visit to Gainesville. This  
13 case has afforded me the opportunity to travel. If you have  
14 anything that I need to do in Paris or London, do let me know.

15 MR. LEFKOWITZ: We'll do our best. We appreciate  
16 it.

17 THE COURT: All right. Have a good day. Thank you.  
18 (Matter concluded.)

19

20

21

22

23

24

25